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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re JONATHON S., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. TIFFANY S., Defendant and Appellant.	E037183 (Super.Ct.No. J104696) **OPINION**

APPEAL from the Superior Court of Riverside County. Becky L. Dugan, Judge. Reversed and remanded with directions.

William Hook, under appointment by the Court of Appeal, for Defendant and Appellant.

William C. Katzenstein, County Counsel, and Julie Koons Jarvi, Deputy County Counsel, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II.C and II.D.

Sharon M. Jones, under appointment by the Court of Appeal, for Minor.

Tiffany S. (mother) appeals from an order terminating her parental rights to her son, Jonathon S. She contends the juvenile court erred by failing to ensure that notice was given in accordance with the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) (ICWA). In the unpublished portion of this opinion, we will agree.

In the published portion of this opinion, we will hold that the mother has standing to raise this contention even though she herself is not Indian. We will further hold, however, that at this point the only order we may reverse based on this contention is the termination order, and not any earlier orders.

I

FACTUAL AND PROCEDURAL BACKGROUND

The relevant facts are few and simple. The Riverside County Department of Public Social Services (the Department) filed this dependency proceeding concerning Jonathon and two of his half-siblings (not involved in this appeal). At that time, Jonathon was four; he is now six.

The jurisdictional/dispositional report stated: "The Indian Child Welfare Act does not apply. [¶] [Jonathon's father] stated that he does have an Indian Heritage (Black Foot), but that he is not part (certified) an Indian Tribe."

At the jurisdictional/dispositional hearing, the juvenile court found that notice had been given "as required by law." However, it made no findings specifically concerning the ICWA.

Initially, Jonathon's father cooperated with the Department. After the jurisdictional/dispositional hearing, however, he went into hiding, apparently because he

"owe[d] child support in three counties . . . ." Meanwhile, the paternal grandmother sought, first, de facto parent status and thereafter placement; although these were denied, she remained in touch with the Department.

The social worker's reports for the six-month review hearing, the 12-month review hearing, and the hearing pursuant to Welfare and Institutions Code section 366.26 (section 366.26 hearing) all simply repeated, "The Indian Child Welfare Act does not apply."

At the six-month review hearing, the 12-month review hearing, and the section 366.26 hearing, the juvenile court still made no ICWA findings.

II

ICWA NOTICE

A. *Statutory Background*.

In general, the ICWA applies to any state court proceeding involving the foster care or adoptive placement of, or the termination of parental rights to, an Indian child. (25 U.S.C. §§ 1903(1), 1911(1)-(3), 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1920, 1921.) "Indian child" is defined as a child who is either (1) "a member of an Indian tribe" or (2) "eligible for membership in an Indian tribe and . . . the biological child of a member of an Indian tribe . . . ." (25 U.S.C. § 1903(4).) "Indian tribe" is defined so as to include only federally recognized Indian tribes. (25 U.S.C. § 1903(8).)

Concerning notice, the ICWA provides: "[W]here the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify . . . the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their

right of intervention. If the identity or location of . . . the tribe cannot be determined, such notice shall be given to the [Bureau of Indian Affairs (BIA)] in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by . . . the tribe or the [BIA] . . . ." (25 U.S.C. § 1912(a); see also 25 U.S.C. §§ 1a, 1903(11).)

To enforce this notice provision, the ICWA further provides: "Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of section[] . . . 1912 . . . of this title." (25 U.S.C. § 1914.)

B. *Standing*.

The Department argues that the mother lacks standing to assert that notice pursuant to the ICWA was not given.

The appellant in a dependency proceeding must be "aggrieved." (*In re Harmony B.* (2005) 125 Cal.App.4th 831, 837 [Fourth Dist., Div. Two]; see also Code Civ. Proc., § 902; Welf. & Inst. Code, § 395.) Recently, one court questioned whether a non-Indian parent was aggrieved by a failure to give ICWA notice to the child's alleged tribe. (*In re Isayah C.* (2004) 118 Cal.App.4th 684, 693-694, fn. 9.) It reasoned that the child had already been placed with a relative of the allegedly Indian parent and that "[i]ntervention by the relevant tribe would only have made it *less* likely that appellant

would receive custody . . . ." (*Ibid*.) However, it found it unnecessary to decide this issue.

Even a non-Indian parent has rights under the ICWA. The ICWA defines "parent" so as to include (subject to one exception not applicable here) "any biological parent or parents of an Indian child . . . ." (25 U.S.C. § 1903(9).) It then provides that "the parent," as well as the tribe, is entitled to notice. (25 U.S.C. § 1912(a).) Here, the mother had notice of the proceedings; she did not, however, receive notice of the tribe's right of intervention, as the ICWA would require. (*Ibid*.)

Moreover, giving notice to the tribe could result in a determination that Jonathan is in fact an Indian child. In that event, the juvenile court would have to make certain specified findings before it could terminate parental rights, including an "active efforts" finding (25 U.S.C. § 1912(d)) and a "serious . . . damage" finding (25 U.S.C. § 1912(f)). Moreover, at least one "qualified expert witness[]" would have to testify at the section 366.26 hearing. (25 U.S.C. § 1912(f).) These heightened requirements would apply regardless of whether the tribe chose to intervene. They all tend to benefit the non-Indian as well as the Indian parent.

We therefore conclude that the mother, although not Indian, has standing to assert an ICWA notice violation on appeal.

C. *Waiver*.

The Department also argues that the mother has waived any ICWA notice issue by failing to raise it below.

Every California court that has faced this question -- including this court -- has held that that a parent can raise an ICWA notice issue for the first time on appeal. (E.g.,

In re Suzanna L. (2002) 104 Cal.App.4th 223, 231-232; *In re Jennifer A*. (2002) 103 Cal.App.4th 692, 706; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 257-258; *In re Samuel P*. (2002) 99 Cal.App.4th 1259, 1267-1268; *In re Marinna J*. (2001) 90 Cal.App.4th 731, 738-739; *In re Desiree F*. (2000) 83 Cal.App.4th 460, 471-472.) This is because "'[t]he notice requirements serve the interests of the Indian tribes "irrespective of the position of the parents" and cannot be waived by the parent. [Citation.]' [Citation.]" (*Suzanna L*., at pp. 231-232, quoting *Samuel P*., at p. 1267, quoting *In re Kahlen W*. (1991) 233 Cal.App.3d 1414, 1421.)

The Department does not confront these cases head-on; it merely argues that, for two policy reasons, the mother should not be able to raise an ICWA notice issue for the first time on appeal.

First, the Department argues that "[a]ddressing this issue now would not serve the underlying policies of the ICWA, which are to preserve Indian culture and protect the stability and security of an Indian tribe and family, because there is no evidence of Indian culture in this family." In *In re Suzanna L*., *supra*, 104 Cal.App.4th 223, we rejected a similar argument. (*Id*. at pp. 232-238.) There, as here, precisely *because* the issue had never been raised below, there had been no reason to present evidence of the family's Indian culture. Moreover, a "tribe may have an interest in proving that the child has an existing Indian family, even when the parents do not." (*Id*. at p. 236.) We also note that the rules that have evolved to govern ICWA notice are complicated enough, without throwing in an unguided evaluation of the family's "Indianness." Thus, giving notice serves the policies of the ICWA regardless of whether the family has been shown to have Indian culture.

Second, the Department argues that "[a]ddressing this issue now would result only in undermining Jonathon's need for stability and permanency, which is of paramount concern." Better to address it now, however, than to see Jonathon's adoption invalidated -- perhaps years down the road -- at the behest of an Indian tribe. In any event, if there really is a conflict between federal law and state policy, then it is the state that must yield. (U.S. Const., art. VI, cl. 2.)

We conclude that the mother can raise the ICWA notice issue on appeal despite her failure to raise it below.

D. *Whether the Notice Requirement Was Triggered*.

"'[T]he Indian status of a child need not be certain or conclusive in order to trigger the [ICWA]'s notice requirements. [Citation.]' [Citation.]" (*In re Suzanna L.*, *supra*, 104 Cal.App.4th at p. 231, quoting *In re Jonathan D.* (2001) 92 Cal.App.4th 105, 110, quoting *In re Desiree F.*, *supra*, 83 Cal.App.4th at pp. 470-471.) There are two policy reasons behind this. First, a parent legitimately may not know whether he or she is a tribe member. (*Dwayne P. v. Superior Court*, *supra*, 103 Cal.App.4th at p. 257; *In re Kahlen W.*, *supra*, 233 Cal.App.3d at p. 1425.) "'Formal membership requirements differ from tribe to tribe, as does each tribe's method of keeping track of its own membership. [Citation.]' [Citation.]" (*Dwayne P*, at p. 255, quoting *In re Santos Y.* (2001) 92 Cal.App.4th 1274, 1300.) Second, each tribe has the exclusive authority to determine its own membership. (*Dwayne P.*, at p. 255.) Indeed, one of the purposes of giving notice is to allow the tribe to determine whether the child is, in fact, an Indian child. (*Id*. at pp. 254-255.) Thus, there is a concern lest the trial court usurp the tribe's authority.

In *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, the court held that the ICWA's notice requirements were triggered when the father said he was not a member of any tribe, but his grandparents "might" have had Indian ancestry. (*Id*. at pp. 1405-1408.) Similarly, in *In re Jeffrey A.* (2002) 103 Cal.App.4th 1103, the court held that the ICWA's notice requirements were triggered when the social worker reported that the children "may be of Native American de[s]cent." (*Id*. at p. 1106, brackets in original.) On the other hand, in *In re O.K.* (2003) 106 Cal.App.4th 152, the father's mother said one of the children "'may have Indian in him. I don't know my family history that much, but where were [*sic*] from it is that section so I don't know about checking that.'" (*Id*. at p. 155.) She added that she did not know whether she was eligible for tribe membership, and she could not identify the relevant tribe. (*Ibid*.) The court held: "This information was too vague and speculative to give the juvenile court any reason to believe the minors might be Indian children." (*Id*. at p. 157.)

Here, the father's statement that he had Blackfoot heritage was even more specific than the statements in *Antoinette S.* or *Jeffrey A.* It was nowhere near as vague as the statement in *O.K.* Accordingly, the juvenile court erred by failing to require the Department to give notice pursuant to the ICWA.

The Department raises two contrary arguments. First, it argues that Jonathon was not an Indian child, as defined by the ICWA, because the father was not a tribe member; thus, Jonathon was neither a tribe member nor the biological child of a tribe member. Presumably the Department is relying on the social worker's statement that the father "is not part (certified) an Indian Tribe." This, however, was incoherent and uncertain. It may have meant that the father was a member of a tribe but not of a "certified" tribe; that

the father had not been "certified" as a member of a tribe; or something else altogether. From this statement alone, the juvenile court could not reasonably conclude that it had *no* reason to know that Jonathon was an Indian child. Indeed, as already noted, the notice requirement is broadly construed in part because a parent may be a tribe member without knowing it.[1]

Second, the Department argues there was no evidence that the "Black Foot" tribe was federally recognized. It acknowledges, however, that the "Blackfeet Tribe of the Blackfeet Indian Reservation of Montana" *is* federally recognized. (67 FR 46328 (July 12, 2002); see also 68 FR 68180 (Dec. 5, 2003).) Particularly in light of how incoherent the social worker's statement otherwise was, the juvenile court could not reasonably conclude that "Black Foot" was not a reference to "Blackfeet." If there is any doubt about the identity of the tribe entitled to notice, the Department can cover itself by giving notice to the BIA.

Finally, we note that, although the father had absconded, the Department was still in touch with the paternal grandmother. Thus, it had at least one possible source for the information that should have been included in the notice. (See 25 C.F.R § 23.11(b), (d); Jud. Council form JV-135.) In any event, such information need only be included if

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[1] *In re Desiree F.*, *supra*, 83 Cal.App.4th 460 held that notice was required because the mother was *eligible* to become a tribe member, even though she was not a tribe member at the time of the section 366.26 hearing, and an earlier social worker's report had stated that she was not a tribe member. (*Desiree F.*, at pp. 470-471; see also *id*. at pp. 466-467.) We are reluctant, however, to adopt the reasoning of *Desiree F*. It relied on the often-stated principle that tribal enrollment is not conclusive with respect to whether the child is an Indian child. This, however, is because not all tribes require enrollment as a condition of membership. Tribal *membership*, as determined under whatever standard the tribe uses, *is* conclusive. Congress could have required that notice be given when a parent is merely eligible for tribe membership, but it chose not to do so.

known. (25 C.F.R. § 23.11(b).) Thus, provided the Department satisfied its duty of inquiry (see Cal. Rules of Court, rule 1439(d)), it could give valid notice even though such information turned out to be unavailable.

We therefore conclude that the juvenile court erred by failing to ensure that notice pursuant to the ICWA was given.

E. *The Effect of the Error*.

In her opening brief, the mother requested "that the order terminating parental rights be reversed . . . ." Nevertheless, the Department argued that we could reverse *only* the order terminating parental rights, and not any earlier orders. As a result, in her reply brief, the mother argued that we could reverse "any other order" in the case (capitalization omitted) -- although, somewhat confusingly, she concluded by requesting yet again "that the order terminating parental rights be reversed . . . ."

In a non-ICWA case, we would hold that the mother waived any right to the reversal of any earlier orders by failing to raise this issue in her opening brief. (See, e.g., *In re Daniel M*. (2003) 110 Cal.App.4th 703, 707, fn. 4.) Nevertheless, given the concerns that have been expressed about allowing a parent to waive a tribe's right to ICWA notice (see, e.g., *In re Suzanna L*., *supra*, 104 Cal.App.4th at pp. 231-232 [Fourth Dist., Div. Two]), we choose not to do so; rather, we will assume, without deciding, that the issue has been preserved.

We do not believe, however, that we have jurisdiction to reverse any earlier orders. At this point, they have the stature of appealable orders from which no appeal was taken. "'"If an order is appealable . . . and no timely appeal is taken therefrom, the issues determined by the order are res judicata."' [Citation.] 'An appeal from the most

recent order entered in a dependency matter may not challenge prior orders, for which the statutory time for filing an appeal has passed.' [Citation.] Appellate jurisdiction to review an appealable order depends upon a timely notice of appeal. [Citation.]" (*Wanda B. v. Superior Court* (1996) 41 Cal.App.4th 1391, 1396, quoting *In re Cicely L.* (1994) 28 Cal.App.4th 1697, 1705 and *In re Elizabeth M.* (1991) 232 Cal.App.3d 553, 563.) Thus, the only order before us is the order terminating parental rights.

We can think of only two even arguable ways we could reach the earlier orders despite this limitation on our jurisdiction.

First, arguably we could do so if the ICWA notice violation wholly deprived the juvenile court of jurisdiction. "When a court lacks jurisdiction in a fundamental sense, an ensuing judgment is void, and 'thus vulnerable to direct or collateral attack at any time.' [Citation.]" (*People v. American Contractors Indem. Co.* (2004) 33 Cal.4th 653, 660, quoting *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 119.) We concur, however, with those courts that have held that an ICWA notice violation is not jurisdictional. (*In re Brooke C.* (2005) 127 Cal.App.4th 377, 384-385, and cases cited.)[2]

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[2] *Brooke C.* was an appeal from the dispositional order. (*In re Brooke C.*, *supra*, 127 Cal.App.4th at pp. 381, 386.) In it, the social services agency conceded that notice as required by the ICWA had not been given. (*Id.* at p. 383.) The appellate court held that, because an ICWA notice violation is not jurisdictional, it could *never* reverse a dispositional order based on an ICWA notice violation; the only order that is *ever* reversible based on an ICWA notice violation is an order terminating parental rights. (*Id.* at pp. 384-385.) It did, however, order a "limited remand" so the social services agency could give the requisite notice. (*Id.* at p. 385.) It indicated that, once such notice was given, if the child was found to be an Indian child, the mother could file a petition in the juvenile court under the enforcement provision. (*Ibid.*)

This is an appeal from the order terminating parental rights. Even under *Brooke C.*, once we find an ICWA notice violation, we must reverse an order terminating parental rights. Thus, the actual issue in *Brooke C.* -- whether we could reverse the dispositional order *in an appeal from the dispositional order* -- is not presented here.

It is simply an appealable error of federal law. Here, the mother forfeited her right to reversal of the earlier orders based on any such error by failing to file a timely appeal.

Second, arguably we could do so if this appeal is, in essence, an invalidation proceeding under the ICWA enforcement provision. As mentioned earlier, the enforcement provision states: "Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of section[] . . . 1912 . . . of this title." (25 U.S.C. § 1914.) The enforcement provision contains no express time limitation.

An appellate court, however, is not a "court of competent jurisdiction" within the meaning of the enforcement provision.[3] As we just explained, we do not have jurisdiction to review an appealable order after the time for filing a notice of appeal has expired. Moreover, in many instances, a petition under the enforcement provision will require the resolution of disputed factual issues. We are just not the right kind of court.

In *Slone v. Inyo County Juvenile Court* (1991) 230 Cal.App.3d 263, this court held that "Congress . . . did not intend that [25 United States Code] section 1914 should preempt the subject matter jurisdiction of any state court or confer new subject matter jurisdiction upon any state court . . . ." (*Id*. at p. 267.) There, the juvenile court had

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[3] Other wording used in the enforcement provision is likewise of questionable applicability to an appeal. For example, is an appeal a "petition"? Moreover, is a child an "Indian child" when there has not yet been any determination to that effect? There is a well-recognized distinction between a court having "reason to know" that a child is an Indian child and a child actually *being* an "Indian child."

sustained a dependency petition concerning three Indian children, removed them from their parents' custody, and terminated reunification services. (*Id*. at pp. 265-266.) At that point, the parents filed a petition in the superior court, purportedly under 25 United States Code section 1914, to invalidate the juvenile court's orders. (*Id*. at p. 266.) The superior court denied the petition on the ground that, under the circumstances, it was not a "court of competent jurisdiction" within the meaning of the enforcement provision. (*Id*. at pp. 265-266.)

We affirmed. We noted that the juvenile court has exclusive jurisdiction over "issues pertaining to the custody of a dependent child . . . ." (*Slone v. Inyo County Juvenile Court, supra,* 230 Cal.App.3d at p. 266.) We also noted that "California law prohibits one department of a superior court from invalidating a ruling made by another department of the same court." (*Id*. at p. 268.) We then held that the enforcement provision does not give a state court any subject matter jurisdiction it does not already have. (*Id*. at p. 267.) We concluded: "While the dependency matter is before the juvenile court, plaintiffs are required to bring their petition in the juvenile court. Once all the issues raised by the petition have been adjudicated in the juvenile court, plaintiffs' recourse for review is to the appellate court. [Citations.]" (*Id*. at p. 270; accord, Cal. Rules of Court, rule 1439(n)(1) [when a child is the subject of an open dependency proceeding, "the juvenile court is the only court of competent jurisdiction" to hear an invalidation petition under the enforcement provision].)

Although *Slone* was dealing with the jurisdiction of trial-level courts, not an appellate court, its reasoning applies equally here. The enforcement provision does not give us any jurisdiction to invalidate a juvenile court order based on an ICWA notice

violation that we would not otherwise have. Any petition under the enforcement provision to invalidate an order in an open dependency must be filed in the juvenile court; only after the juvenile court renders an appealable ruling on the petition can we review the issues on appeal. Accordingly, although some appellate courts have suggested that an appeal asserting an ICWA violation is, in itself, a proceeding under the enforcement provision (*In re S.M.* (2004) 118 Cal.App.4th 1108, 1115, fn. 3; *In re Daniel M.*, *supra*, 110 Cal.App.4th 703, 707-708; *In re Pedro N.* (1995) 35 Cal.App.4th 183, 190; *In re Riva M.* (1991) 235 Cal.App.3d 403, 411, fn. 6), we must disagree.[4]

For these reasons, we conclude that the only order subject to reversal in this appeal is the order terminating parental rights.

III

DISPOSITION

The order terminating parental rights is reversed. We order a limited remand, as follows.

The juvenile court is directed to order the Department to give notice in compliance with the ICWA and related federal and state law.

Once the juvenile court finds that there has been substantial compliance with the notice requirements of the ICWA, it shall make a finding with respect to whether Jonathan is an Indian child. (See Cal. Rules of Court, 1439(g)(5).) If at any time within 60 days after notice has been given there is a determinative response that Jonathan is or is not an Indian child, the juvenile court shall find in accordance with the response. (Cal.

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[4] For this reason, although we held that the mother has appellate standing (see part II.A, *ante*), we did *not* reason that her standing derives from 25 United States Code section 1914. (But see *In re Riva M.*, *supra*, 235 Cal.App.3d at p. 411, fn. 6.)

Rules of Court, 1439(g)(1), (4).) If there is no such response, the juvenile court shall find that Jonathan is not an Indian child. (Cal. Rules of Court, 1439(f)(6).)

If the juvenile court finds that Jonathan is not an Indian child, it shall reinstate the original order terminating parental rights.

If the juvenile court finds that Jonathan is an Indian child, it shall set a new section 366.26 hearing and it shall conduct all further proceedings in compliance with the ICWA and all related federal and state law.

CERTIFIED FOR PARTIAL PUBLICATION

RICHLI
J.

We concur:

HOLLENHORST
Acting P.J.

GAUT
J.